No. 14,670

IN THE

United States Court of Appeals

For the Ninth Circuit

NORMAN BREELAND,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY, and E. D. MOODY,

Appellees.

APPELLANT'S REPLY BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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STATEMENT OF THE CASE.

The statement of the case as heretofore presented in briefs by appellant and appellees is substantially correct and no useful purpose could herein be served by a repetition thereof save to reply to a new issue raised by appellees in their statement of the case. At page 3 of their brief, appellees state that while summary judgment was based on the failure of appellant to comply with the agreement provisions, it also appears that the action is barred by the expiration of the four year limitation period of Section 337 of the California Code of Civil Procedure.

It is elementary that the statute of limitations does not begin to run until a cause of action accrues. Under the collective bargaining agreement at issue herein, a discharged employee had certain administrative steps to seek reinstatement including presenting his grievance to the superintendent and then to the general manager of the defendant carrier. As decided in *Wallace v. Southern Pac. Co.,* 106 F. Supp. 742; *Buberl v. Southern Pac. Co.,* 94 F. Supp. 11; *Transcontinental & Western Air, Inc. v. Koppal,* 345 U.S. 653, and *Barker v. Southern Pac. Co.*, 214 F. 2d 918, these administrative steps must be taken as a condition precedent to recourse to the courts. It therefore follows that until an employee has taken these steps and been denied relief, he has no cause of action on which to bring a suit at law and no cause of action accrues until an adverse final decision by the general manager's office. In the case at bar, this occurred on September 5, 1950, when Mr. H. R. Hughes made his decision denying plaintiff reinstatement. The actionable breach occurred at this time when defendants refused plaintiff reinstatement and made his discharge final. Plaintiff commenced his action on December 22, 1953 (R. 3, 13, 22), three years, three and one-half months after the date of the actionable breach, which is within the four year limitation period imposed by Section 337(1) of the California Code of Civil Procedure.

QUESTIONS PRESENTED.

Appellees in their brief (pp. 4, 5) contend the "specific questions" herein at issue are not as stated by appellant in his brief (p. 4). The substitute questions proposed by appellees, however, affirmatively state in a light favorable to appellees what the disputed issues are. Question one avers that it affirmatively appears, and is not disputed, that appellant has wholly failed to comply with an express provision of the collective bargaining relative to maintaining an action for wrongful discharge. Appellant has vigorously contended that he has complied with all the so-called administrative requirements of his collective bargaining agreement prior to instituting his action at law. The purpose of this appeal, is to seek an appellate determination of the very issue which appellees assert as undisputed fact.

Question two affirmatively states that the provisions of the collective bargaining agreement are clear and unambiguous and the application thereof to the parties herein undisputed. Here again, appellant has contended and continues to contend that Article 58(c), Item (6) of the collective bargaining agreement has no application to appellant whose cause of action is one in law for damages for wrongful discharge and not a "time" claim within the purview of that section. Appellees have affirmatively stated as undisputed one of the major disputes herein.

Question three submitted by appellees asserts that in the intervening period between appellees' first and second motions for summary judgment a controlling decision was rendered by this Court. The "control-

ling decision'' to which reference is made is *Barker v. Southern Pac. Co.,* 214 F. 2d 918, decided by District Judge Goodman subsequent to denial of appellees' first motion and a decision which in no way departs from the rules of law announced in *Wallace v. Southern Pac. Co.,* 106 F. Supp. 742; *Buberl v. Southern Pac. Co.,* 94 F. Supp. 11; *Transcontinental & Western Air, Inc. v. Koppal,* 345 U.S. 653 and a host of other cases cited by appellees, the decisions of which were all rendered prior to appellees moving for summary judgment in the first instance. It is of interest to note that appellees are not consistent in their contention that the case, as a decision subsequent to the ruling on appellees' first motion for summary judgment, is controlling by reason of being new law on the subject matter herein. On page 9 and again at page 17 of their brief appellees state that there are numerous cases in the District Courts in this circuit in which the *same principles* have been applied (emphasis added). It appears as well, as contended by appellant, that if any doubt as to the principle set forth in the *Barker* case existed, "that doubt was set at rest by the decision of the Supreme Court in *Transcontinental & Western Air, Inc. v. Koppal,* 345 U.S. 653 (June 1, 1953)''. (Appellees' Brief, page 13.) The *Koppal* case, supra, was decided prior to the first motion for summary judgment.

ARGUMENT.

Appellant has no argument with the general rule expressed in the cases of *Barker v. Southern Pac.*

Co., supra; *Buberl v. Southern Pac. Co.,* supra; *Transcontinental & Western Air, Inc. v. Koppal,* supra and others cited by appellees, that a party to a collective bargaining contract which provides grievance procedures for the settlement of disputes within the scope of such contract must exhaust these administrative or "interval" remedies before resorting to the courts.

In the cases cited by appellees, the failure of each plaintiff was to comply with a procedural step provided within the contract. In *Buberl v. Southern Pac. Co.,* supra, the plaintiff failed to appeal to the general manager. In *Wallace v. Southern Pac. Co.,* supra, the plaintiff failed to present a grievance within 60 days of dismissal. In *Barker v. Southern Pac. Co.,* supra, plaintiff failed to file a written notice for a hearing within ten days of dismissal. In *Cone v. Union Oil Co.,* 129 A.C.A. 648, 277 P. 2d 464, plaintiff completely neglected to initiate arbitration proceedings as provided by the contract. In each of the cases cited, the "administrative" or "procedural" or "internal" remedies for grievance provided for by the agreement itself for settling disputes within the scope of the agreement were not complied with.

I. THE ONE YEAR PROVISION OF ITEM 6 OF SECTION (c) OF ARTICLE 58 OF THE COLLECTIVE BARGAINING AGREEMENT WAS NOT A PROCEDURAL STEP FOR ADJUSTING GRIEVANCES WITHIN THE SCOPE OF THE AGREEMENT.

Appellees apparently concede that all the grievance steps provided by Article 58 of the agreement herein

were taken, commencing with presentation of the grievance or claim within ninety days of the date of occurrence through presentation of the claim to the superintendent within ninety days from the date of the notice declining the claim, notification to the superintendent of intention to appeal and finally presentation within one year to the highest general officer of the carrier designated to handle such claims and cases. In short, all the administrative remedies provided by the employment contract had been exhausted. All the provisions for the "internal" handling of appellant's claim had been complied with. After adverse decision by the highest general officer designated to handle such claims and cases, there was no provision for any further appeals to any higher person within the carrier organization.

The one year limitation provided by Item (6), Section (c) of Article 58 (the non-applicability of which is argued hereinafter) is not a grievance remedy provided within the contract and the rulings of the *Barker, Wallace* and *Buberl* cases have no application herein. If the language of the one year period be applicable to appellant, and appellant contends it is not, the legal question is not one of exhaustion of contractual administrative remedies, as these have been complied with, but a question of whether or not a collective bargaining agreement can validly set up a limitation period for lawsuits brought for the breach of the agreement, where that period is one year as opposed to four years established by statute.

Appellant cites *Gifford v. Travelers Protective Ass'n.,* 153 F. 2d 209 as authority that a collective bargaining agreement may validly set forth a limitation period considerably shorter than that provided by statute for actions predicated upon breach of that contract. In the *Gifford* case supra, the court found that the trial court delayed its final judgment to give the plaintiff an opportunity to "plead by way of replication any pertinent facts in avoidance of the time limitation," and by plaintiff's failure to so do he admitted the facts alleged and left the trial court no alternative.

In the instant case, the trial court apparently held that the appellant had not exhausted his administrative remedies and therefore he was precluded from prosecuting his claim.

II. THE DISTRICT COURT PERFORCE DETERMINED APPELLANT'S CLAIM TO BE A TIME CLAIM WITHIN THE PROVISIONS OF THE AGREEMENT. SUCH DETERMINATION WAS NECESSARY TO APPLY THE ONE YEAR LIMITATION TO APPELLANT'S CLAIM.

Appellees argue that the language of Item (6) Section (c), Article 58 clearly designates that a one year limitation period applies to *all* claims, grievances or cases arising under the collective bargaining agreement and that the phraseology of "highest officer designated by the carrier *to handle time claims*" merely identifies the officer who is empowered to make a final decision in all cases, irrespective of the type of claim, grievance or case that it may be. Appellees ask this court to take judicial notice that

there are many types of claims by individuals against a large railroad, both by employees and non-employees (Appellees' Brief, page 22), and that each of these several types of claims falls within the jurisdiction of a separate department of the company wherein it "is finally passed upon by an officer of that department duly delegated to perform that function". Appellees further state the "obvious and necessary" purpose of identifying the officer having final jurisdiction to pass upon time claims was to distinguish him from other officers of the company having final jurisdiction over other types of claims against the company. (Appellees' Brief, page 22.) This is precisely what appellant contends and there appears to be a happy agreement on this point. The only logical reason for the wording of Item (6) is to designate in which department claims must be further litigated within a one year period and that department is the one which handles time claims and time claims are specifically the only claim on which proceedings must be instituted within one year.

III. THE DECISION IN THE BARKER CASE DID NOT CHANGE THE LAW AS IT EXISTED AT THE TIME THE FIRST MOTION FOR SUMMARY JUDGMENT WAS DENIED.

Appellees contend the denial of the first motion did not bar a second motion on the same grounds, apparently on the basis that a good cause was shown why the prior ruling was not applicable. The good reason is averred to be the Barker decision, which appellees initially contend was clearly opposed in principle to previous rulings (Appellees' Brief, page

27). Next appellees state the *Barker* case merely clarified existing law (Appellees' Brief, page 28). However, it is admitted the Barker decision merely enunciated the principle stated in the *Koppal* case (*Transcontinental & Western Air, Inc. v. Koppal,* supra) which was a Supreme Court decision rendered prior to the first motion for summary judgment.

It is respectfully urged, as it has been consistently urged by appellant, that the *Barker* case promulgated no new rules of law which had not been set forth prior to appellees' initial motion herein and therefore the denial of the motion worked as a bar to a second motion on identical grounds.

IV. THE GRANTING OF SUMMARY JUDGMENT HEREIN WAS NOT HARMLESS ERROR.

Appellees argument herein may be reduced to simple terms. Appellees contend they would have prevailed in any event, so what harm could possibly be shown by appellant who just happened to be erroneously counted out at the initial stage of the legal proceedings. With this self-assured position, appellant is unable to agree. Contrary to appellees assertions (Appellees' Brief, page 30) there is a substantial issue herein as to whether or not appellant comes within the limiting clause of the agreement which purports to refer only to time claims. If it does relate only to time claims as contended by appellant, appellant has every right to litigate his cause of action and a deprivation of that right could hardly be termed "harmless error".

The issue of the limitation period of four years provided by Sections 335 and 337 of the California Code of Civil Procedure has heretofore been treated under appellant's statement of the case. It is simply that appellant's cause of action at law did not accrue until September 5, 1950, when reinstatement was refused. The statute does not begin to run until a cause be actionable. Prior to the September date, by reason of his activity in pursuing his administrative remedies, appellant could not bring a suit at law, and the statutory limitation period obviously could not begin to run.

CONCLUSION.

It is sincerely urged that the fact alone that several recent actions for wrongful discharge have been disposed of by judgment for defendants, either by way of summary proceedings or trial, is not a good or legal reason for denying relief to appellant. The issue is whether or not appellant can legally proceed to trial.

It is respectfully submitted that the judgment appealed from should be reversed and the cause remanded for trial.

Dated, Sacramento, California,
July 25, 1955.

THOMAS C. PERKINS,
Attorney for Appellant.